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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-3091

JOHN D. BURTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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JOHN D. BURTON, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on May 28, 1971.

OPINION BELOW

The opinion of the Court of Appeals below is unreported. This being a jury trial in the District Court, there was no written opinion. See 443 F. 2d 912.

JURISDICTION

The judgment of the Court below (Appendix "B", Pages 6 - 8) was entered on May 28, 1971. Rehearing was not sought. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

It is elementary that the jurisdiction of federal courts is defined and limited by the Constitution and congressional

action; hence, statutes such as Section 1341 should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress. Healy v. Ratta, 292 U.S. 263, 270, 54 S. Ct. 700, 78 L. Ed. 1248 (1933); Kline v. Burke Constr. Co., 260 U.S. 226, 233-234, 43 S. Ct. 79, 67 L. Ed. 226 (1922). Moreover, such construction is especially appropriate where, as here, the Government urges that we construe a federal criminal statute so that it reaches conduct which the states should appropriately control and which they can control, effectively. Indeed as the Supreme Court has emphasized, Section 1341 is not designed to reach all frauds "but only those limited instances in which the use of the mails is a part

of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." Kann v. United States, 323 U.S. 88, 95, 65 S. Ct. 148, 151, 89 L. Ed. 88 (1944); see also Parr v. United States, 363 U.S. 370, 80 S. Ct. 1171, 4 L. Ed. 2d 1277 (1962).

QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner denied constitutional Due Process of law by denial of his Motion for Acquittal filed at the conclusion of all evidence?

2. Is Title 18 U.S.C. Section 1341 repugnant to the Due Process clause of the United States Constitution, as applied to Petitioner herein, when said statute is employed to punish Petitioner's

conduct when said conduct does not mislead an ordinarily reasonable and prudent man?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution. (Appendix "C".)

2. The statute upon which Petitioner was prosecuted, Title 18 U.S.C. Section 1341, provides as follows:

> § 1341: Frauds and swindles.
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fradulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security,

or other article, or anything represented to be or intimated or held out to be such counterfiet or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended May 24, 1949, c. 139, §34, 63 Stat. 94; August 12, 1970, Pub. L. 91-375, §6(j)(11), 84 Stat. 778.

STATEMENT OF CASE

On November 28, 1967, Petitioner was charged in a 27-count indictment with mail fraud in violation of Title 18 U.S.C. Sections 1341 and 2 (See Appendix "A",

Pages 1 - 5).

On May 26, 1970, the case came on for trial before a jury, presided over by United States District Court Judge Alexander Harvey, II. The trial continued through June 2nd, and on that date, the jury found Petitioner guilty as to all 27 counts of the indictment.

The Petitioner was sentenced on September 11, 1970 to two (2) years in prison. A Notice of Appeal was filed on that date and argued before Chief Judge Haynsworth and Circuit Judges Bryan and Butzner of the United States Court of Appeals for the Fourth Circuit.

On May 28, 1971, the Court of Appeals

affirmed the judgment of the District Court in Case No. 15,199.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided a federal question that is in conflict with the reported decision in the Third Circuit Court of Appeals in Kram v. U.S.A., 247 F. 2d 830 (CA-3(1957). There are also decisions unreported out of the Southern District of California, Central Division, in a case styled U.S.A. v. Reywick, No. 28-785 (C.D.), wherein the trial court, in essentially identical circumstances, upon its own motion, entered an order acquitting defendants, of April 27, 1961.

This case falls between Linden and Baylis v. U.S., 259 F. 2d 560 (CA-4)(1958), and Kram v. U.S., 247 F. 2d 830 (Pa)(1957), and is, muddied some by the per curiam opinion in Leopold v. U.S.,418 F. 2d 247 (CA-4)(1969), which summarily gave imprimatur to Linden.

As each case must be reviwed under its peculiar facts and circumstances, it is vital that the Linden-Kram-Burton evidence be most closely digested and differentiated. Linden was a Court trial (Thomsen, J.), affirmed. Kram was a jury trial, reversed. Burton was a jury trial, which Petitioner contends should be reversed.

Petitioner raises the defense conten-

tion in Kram that the indictment in Burton failed in probata of the allegata and, in so doing, fell short, at Law, of the prima facie necessary to permit the facts to go to the jury for determination. The Trial Court, which obviously was convinced the indictment at bar was pure and simple Linden revisited (the charge to the jury being about verbatim reading of the Linden decision), commented it need not hear from the Government on the motion for acquittal at the close of the Government's protracted evidence and found a jury question existed as to scheme and intent.

An alarming paragraph appears in Linden:

> "Since the judge (a Court trial) found as a fact that the forms used were captious, and misleading, and we see no error there, we don't reach the constitutional question..."

Since Burton was a jury trial and the judge was not the trier of fact, he was constrained, at the motion of acquittal, to rule on the Kram contention that the government did not present sufficient proof of its theory that Petitioner knowingly evolved an intentionally misleading solicitation and put it into effect. The jury trial was conducted as Linden revisited and was not the theory set out in the indictment presented -- a prosecutorial tactic which denied Petitioner due process of law (Kram). The proof did not sustain the charge of

fraudulent solicitation and the motion to acquit should have been granted.

(Of interest was the defense argument as to whom the charge of devising a scheme should fall. A fraudulent solicitation of the Petitioner, or the forum selection of California postal inspectors in the Fourth Circuit where Linden was a post office victory, solidified later in Leopold.)

Under the broad mail fraud statute of mailing from and mailing to, the question of fundamental fairness versus chicane for conviction emerges. Of the 49 states solicited, it is suspect that the case came to Maryland. Inspector Campbell testified, most innocently,

that "I made no report to the U.S. Attorney in Los Angeles...after the U.S. Attorney in Baltimore became interested in the case."

In the Burton indictment is the allegata (Counts 1 to 10, adopted in Counts 11 to 27) that Petitioner

> "...devised and intended to devise a scheme or artifice to defraud a large number of persons, firms, partnerships, and corporations in the state of Maryland and elsewhere who in the conduct of their business ordinarily and routinely subscribed to listings in the yellow pages or classified telephone directory ...for the purpose...to induce those intended to be defrauded to purchase listing or advertisements in a book published by the defendant...by means of captious, deceptive, and misleading solicitations designed by the defendant to be misinterpreted by the recipients as

> bills or statements of accounts due for listings and advertisements in the yellow pages or classified telephone directories....
>
> "...the aforesaid scheme to defraud, devised and intended to be devised by the defendant was known to him to be a false and fraudulent scheme and was designed by him willfully and knowingly with intent and purpose of inducing the intended to be defrauded to pay over and deliver to him certain sums of money." (Emphasis added.)

The Government (T. 32) summarized that:

> "The theory of the Government's case is that the form was designed to deceive, that it was designed to fool people and make them think that it was a bill for services, be it a listing or an advertisement, that they already had in the yellow pages. That pure and simple is the theory of the government's case."

The Linden solicitation form is reproduced at 254 F. 2d 561. The Burton form is Government Exhibit No. 2 in the record. The forms are totally different. Linden has block red letters saying, "FINAL NOTICE" and in large type "Listing will not appear unless payment is made now. This form must be returned to insure proper credit in the Maryland Classified Business Director." The form carried "Catonsville, Arbutus, and Richmond" areas. The reverse was printed in GREY ink and mentioned the word solicition within the small body type. The forms were typed in New York City, shipped parcel post to Baltimore, deposited in Baltimore to get the Baltimore Post Office cancellation and the return envelopes were made out

to a Baltimore address. Checks were sent to the C&P Telephone Company.

Mr. Linden, before the grand jury, testified about individual, attorney and Better Business Bureau complaints and used the word "invoices". He told Inspector Murray, with presumable smugness, that he was not responsible for any conclusions recipients might infer. Mr. Linden also signed an affidavit of discontinuance in Cleveland for a form which read, "not a telephone company publication" which he deleted in his Baltimore operation.

Judge Thomsen was absolutely correct, as trier of facts and law in Linden, to find mortal sin committed and the form one "reasonably calculated to deceive

persons of ordinary prudence and comprehension."

Mr. Kram, with his plastic saints and rosaries, signed an affidavit of discontinuance and changed his solicitation at postal authority suggestion. He signed a second affidavit when his second solicitation was held, by postal inspectors, to be suspect and said he would not resume his business. He, however, continued with a third form and was prosecuted. The government in Kram did not prove the alleged scheme to defraud, and the case was reversed at circuit level. So also here.

Petitioner Burton, a very ill person, unable to do physical work or hold a

routine office job, started a directory in Florida, which postal officials termed suspect. He met voluntarily with Inspector Campbell and candidly explained his operation in detail. Campbell suggested revisions which were made; and, still suspicious, Campbell suggested he quit business in Florida and made report to the Miami U.S. Attorney. Petitioner Burton signed the affidavit to discontinue and stopped his Florida operation. He then sought legal counsel, and, presumably, made a survey of operations found violative the mail fraud statute, Title 18 U.S.C. Section 1341.

Petitioner, for reasons of health, moved to arid southern California and,

Government evidence showed, registered his new publishing company with the State, changed his solicitation form, met all postal requirements and solicited businessmen, taken from available telephone directories, to subscribe to a non-existing national directory which would perform a service to the subscriber, other businessmen, and himself --- all persons engaged in free enterprise. His director became but another publication among the legions of directories in the nation in competition with and eschewed by the Bell System and its appendage advertising agencies. (The legal profession alone has myriad directors from Martindale-Hubbel down to Campbell's Directory.)

Inspector Lerable came from Los Angeles (be it 300 miles or 180 miles roundtrip) to read Miranda, explain Linden, and split nisi prius decisions and (in paraphrase) say, "I think you are illegal. I suggest you go out of business, refund all you have collected, suffer all losses incurred, or we'll close you down and lock you up. You better get a lawyer, because we have you tagged as a buncoman. So get out of competition of get burned." Petitioner Burton replied "I don't want to be involved in anything illegal" (T. 621), and without counsel, explained his operation in detail and identified his forms and directories.

This veteran, self-styled, expert postal inspector then admits Petitioner had complied with all State and Federal laws, had abided with all postal regulations (in 1966), and added, he had no authority to intercept Petitioner's mail. He admitted he did not answer Petitioner's attorney's inquiries and made no report, because, as above, the U.S. Attorney in Baltimore became interested in the case. Yet he came East to Baltimore to join Inspector Bock and other postal sleuths in a canvass of Maryland subscribers to ferret out witnesses for trial.

(Here also, Petitioner contends due process was violated by the presentation

of only one postal inspector to the grand jury reciting hearsay testimony when other postal probers and trial witnesses were within walking distance of the courthouse --- a fact unknown to ther Jerseyan defense counsel who entered stipulation. Petitioner re-alleges an error in the denial of his motion to dismiss the indictment on the this ground --- again fundamental fairness and the "some evidence" to be presented concepts.)

Petitioner's form carried, in the second largest point type on the face of the solicitation "This solicitation is not a bill or invoice." This warning does not appear in Linden, Kram or Leopold.

His form was different in format, layout, color and wordage from bills of the C&P Telephone Company, or the Reuben Donnelly Advertising Agency. Every step was taken to avoid similarity to bills known to telephone directory subscribers. The open book logo was not copyrighted, nor did it carry "Yellow Pages." An open book logo, a bible, is used by the Christian Scientist publications which, on first glance, could be said to be a Yellow Page logo.

The government evidence showed Petitioner, once told in Florida about captious, misleading solicitation forms, went out of his way to conform to all the then existing laws and regulations set out for

legitimate enterprise. He solicited business people, who in contract and advertising, are impressed with a higher standard of caution and alertness than the fervent religious ethnic subscribers in Kram. Judge Thomsen in Linden set a lower than business operator standard as that of "persons of ordinary prudence and comprehension." Business people, especially specialists and officers of corporations, have a higher standard. The Government proved businessmen returned the directory solicitation with legends, "Drop Dead" and "Why Do You Spend Postage On Such A Thing". The overwhleming majority of solicitees filed the form in File 13, the wastebasket. These were the people of ordinary prudence and compre-

hension.

The Court said, inter alia, while reading the Linden decision in his instructions, that the Petitioner, at law, is responsible for the consequences of his actions. The obverse applies with equal force to the businessman with his standard above the person of ordinary prudence and comprehension.

Applying the Thomsen standard of the Linden case to the witnesses appearing in Petitioner's case, we find:

1) Rothhalz, Jones, Gagne, Armato, Lentz, Blades, Norris, and Leaning all knew they paid Yellow Page advertising monthly on their regular C&P bills;

2) Rothhalz said he didn't look too closely, but stated "it looked like good advertising for the company, and we could use the business;" Thompson said a careful reading showed it to be a solicitation and not a bill which his firm treasurer saw because "he read it more carefully than I did'." Klein said he did not read it because he was expanding Civic Center national advertising at the time; Jones said he paid the C&P bill and subscribed to Petitioner's directory on the same day; Gagne refused to renew her subscription; Connelly made an address change and sent it on for further check to New Jersey; Lentz "assumed" it to be a telephone bill; Shanes "thought" it a bill and sent it to California with address change; Wolf

said he never read any utility bill or solicitation; Blades thought it was for California advertising; Norris was satisfied with Petitioner's directory; Rives said "if I read it, I would have known it was not for the Yellow Pages;" Haley, like Wolf, never read utility bills or solicitations; Leaning approved the advertising, but was turned down by Skokie headquarters which read the form; Enoch "just paid it" and was satisfied with Petitioner's director; Cook said he "was under the assumption it was an invoice for a listing in a directory of some sort;" Hovsepian simply signed anything his secretary handed him.

3) Rothhalz said that he knew it was

for a national directory; Klein, Gagne, Lentz, Shanes, Rives, Manekin, Haley, Gilbert, Rogers, Hovsepian all said Petitioner's solicitation form was different in size, color, layout and wordage than their regular telephone bills.

4) Kaiser, the pawnbroker, Cavanaugh, the realty secretary, the Raine treasurer, Skokie headquarters, (the persons with ordinary prudence and comprehension), all questions, rejected, or reported the solicitation to the telephone company or postal authorities.

5) No one testified sleuths advised them to seek refunds.

6) Most were satisfied and made no complaint, after receipt of the Petitioner's directory, and became dissatisifed only after postal inspectors questioned them and gave the impression that they were victims of an "illegal", "something wrong", "fraudulent" business operation of which "a lot have been going on."

7) Rothhalz didn't care because it "sounded like good business;" Klein was indifferent, Gagne said "it was a mistake on my part;" Armato said "I was stupid;" Lentz admitted to being "imprudent and negligent;" Blades said "I was negligent in not reading it...it was my error;" Norris labeled herself an "imprudent businesswoman" who learned a good lesson;

Haley said "I should have been more careful;" Enoch said "I thought if I was that dumb...;" Gilbert explained he was "very much so negligent" that "I read everything today;" Cook admitted "I was imprudent not to read the form;" Hovespian commented "unfortunately, I have to plead stupidity...."

These witness, a select few from those Marylanders who subscribed (and the others must be presumed to have been contacted) admitted personal neglect and error and graded their actions below the standard set by Judge Thomsen as adopted in Linden. They, in effect, said they were responsible for the consequences of their acts.

Their testimony, not objected to as in Linden, proved to lower the proof below even preponderance let alone the higher thermometer level far beyond reasonable doubt.

The Government proved that Petitioner mailed from Campo and received mail at Campo. It proved mail was sent from Baltimore and Maryland to Campo. It did not prove mail sent to Campo from "elsewhere". It proved Petitioner conformed to all then existing State law and postal regulations. It proved postal inspectors ignored Petitioner's attorney's request for allegations of illegality. If proved implied, if not actual, chicane in moving the case to a "favorable climate" for a

conviction. It proved people in business do not meet the standard of the reasonably prudent person in a given situation. It put on a lot of evidence (809 pages of transcript) and spent a lot of Federal time and money.

But, in its own case in chief, it did not show, even prima facie, and certainly not beyond a reasonable doubt, that the Petitioner's solicitation form was designed to deceive, to fool people and make them think it was a bill for services they had in the Yellow Pages. Failing in probata, the Court erred in finding sufficient evidence to go to the jury, erred in denying the motion for acquittal and, by so doing, denied Petitioner due process of law under

Kram in that the Government failed in the theory of its case as presented.

Therefore, Petitioner, contending he was not the scofflaw seen in Linden, but a legitimate businessman, prays this Court grant the within Petition.

Assuming, arguendo, but not admitting, that the opinions expressed by the Governments' witnesses were admissible "testimony", it would lack all probative force under the doctrine caveat emptor.

The Petitioner's form was a contractual solicitation to bid involving a personal property right, or chose-in-action, to be included as a subscriber to whom benefits would flow from owners and users of a

national business directory and the mailing list and accommodation information outlined on the back of the solicitation (in black on white, in readable print, not the small grey of Linden, or the yellow paper form in Leopold).

As a solicitation for the purchase of personal property which contained no implied or express warranties, the form falls within the common law maxim of "Let the buyer beware, or take care", which maxim summarizes the rule that the purchaser must examine, judge, and test for himself (Black's Law Dictionary, page 281, citing Kellogg Bridge Company v.

Hamilton, 110 U.S. 108 (1883) (Ohio) (Justice Harlan), and Miller v. Tiffany, 1 Wallace 298 at 309.

Websters Unabridged Dictionary, Page 428, defines caveat emptor as "Let the purchaser beware, that is, let him examine the article he is buying and act on his own judgment and at his own risk" --- a maxim implying a rule of English and American law that the purchaser buys at his own risk, except as to express warranties on those implied by law.

Kellogg Bridge cites Barnard v. Kellogg, 10 Wallace 383, for the proposition:

> "No principle of the common law has been better established, or more often affirmed, both in this country and in England, that in any sale of personal property, in absence of express warranty, where the buyer has the opportunity to inspect the commodity (solicitation) and the seller is guilty of no fraud and is neither the manufacturer nor grower of the article he sells, the maximum caveat emptor applies."

And, most poignant at bar, is the rule in Miller and Tiffany, supra:

> "Where there is neither fraud nor warranty and the buyer receives and retains the goods without objection, he waives the right to object afterwards and is finally concluded. In such cases, the rule caveat emptor applies (citing Hargous v. Stone, 1 Shelden 73)."

The government evidence, at bar, shows clearly that not one included subscriber

who testified made complaint or sought refund or took legal action (Linden, Leopold, Kram) until after they had been ferreted out and selected to testify by postal inspectors who created doubt that they had been mulcted by an illegal operation, which, at that point in time, was not proved or subject to trade slander by suspicious and/or enterprising Federal officials.

Petitioner contends the "testimony" to have been of no probative force, which contention should have been realized by the Trial Court when assessing the motion for acquittal for the several counts in the indictment.

Therefore, Petitioner contends there was no evidence of any probative value before the Court which could, at law, be given over to a jury for determination of scheme or intent to defraud in violations of the very broad mail fraud statute. Petitioner Burton prays this Court so find and grant the within Petition.

CONCLUSION

Petitioner respectfully prays, for the reasons cited hereinbefore, that this Court find that the Government has applied Title 18 U.S.C. Section 1341 to Petitioner in an unconstitutional manner; that he was deprived thereby of

constitutional due process of law; and therefore, that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

INDICTMENT

The Grand Jury for the District of Maryland charges:

"1. That on or about December 7, 1965, and continuing through and including October 16, 1967,

JOHN D. BURTON

hereinafter known as the defendant, devised and intended to devise a scheme and artifice to defraud a large number of persons, firms, partnerships and corporations in the State of Maryland and elsewhere, who in the conduct of their businesses ordinarily and routinely

subscribe to listings and advertisements in the 'Yellow Pages', or classified telephone director, hereinafter known as those intended to be defrauded.

"2. That it was part of the scheme and artifice to defraud that the defendant would and did rent on or about December 7, 1965, Post Office Box 146 at La Mesa, California; that it was part of the scheme and artifice to defraud that the defendant, on or about December 27, 1965, would and did register the name 'Classified Directory Company' with the approriate authorities in the County of San Diego, California, as provided by law; that it was part of the scheme and artifice to defraud that

the defendant would and did rent, on or about May 14, 1966, Post Office Box 176 at Campo, California.

"3. That the scheme and artifice to defraud, devised and intended to be devised by the defendant, and effectuated by him under the style and name of Classified Directory Company, was to induce those intended to be defrauded to purchase listings or advertisements in a book published by the defendant, known as Annual Classified Business Directory, by means of captious, deceptive and misleading solicitations designed by the defendant to be misinterpreted by the recipients thereof as bills and statements of accounts due

for listings and advertisements maintained by those intended to be defrauded in the 'Yellow Pages' or classified telephone directory.

"4. The aforesaid scheme and artifice to defraud, devised and intended to be devised by the defendant was known to him to be a false and fraudulent scheme and was designed by him willfully and knowingly with the intent and purpose of inducing those intended to be defrauded to pay over and deliver to him various sums of money.

"5. On or about the 15th day of June, 1966, at Silver Spring, in the State and District of Maryland,

JOHN D. BURTON

for the purpose of executing the aforesaid scheme and artifice and attempting to do so, and for the purpose of obtaining money by said false and fraudulent scheme knowingly caused to be delivered by mail according to the direction thereon, mail matter addressed to Scientific Glass Apparatus Company, Inc., Wheaton Plaza Office Building, Silver Spring, Maryland.

"18 USC Sections 1341 &2"

The indictment contained twenty-seven counts. Each count is the same, except for the mailing count recited in the last paragraph.

APPENDIX B

JUDGMENT

Before Haynsworth, Chief Judge, and Bryan and Butzner, Circuit Judges.

Robert Eugene Smith (Edwin D. Apell on brief) for Petitioner, and Nevette Steele, Jr., Assistant United States Attorney, (George Beall, United States Attorney, on brief) for Respondent.

Per Curiam:

Appeal is taken from a mail fraud conviction under Title 18 U.S.C. Section 1341. The government's case was based upon the striking similarity between the defendant's "solicitation" for advertising and an ordinary invoice from the telephone company billing for space in its classified directory. The

Defendant did publish a national directory. Fault may be found only in the manner in which he attracted participants. The testimony of these unwary contributors to the defendant's finances was that after only a cursory examination, they believed that they were paying for the telephone directory advertising, and that they would not have knowingly subscribed to the defendant's directory.

We note that the solicitation mailed by the appellant was not identical to a bill for a "yellow pages" listing and that it disclosed on its face that it was merely a solicitation. But we conclude that there was sufficient

evidence to support a jury's finding that the appellant's notices were calculated to mislead the unwary and that their mailing was punishable as mail fraud. Linden v. U.S., 4 Cir., 254 F. 2d 560.

Earlier he had suspended a similar enterprise based in Florida after warnings by a postal inspector. He moved to California, however, and resumed the business there. It was from California that he caused the mailings upon which this indictment is based.

Affirmed.

APPENDIX C

FIFTH AMENDMENT
UNITED STATES CONSTITUTION

(Rights of Accused
in Criminal Proceedings)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person by subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

SAMPLE FORMS OF THE CLASSIFIED DIRECTORY COMPANY

EXHIBIT NO. 1*

CLASSIFIED DIRECTORY CO.

We are independent publishers of a classified directory encompassing business firms throughout selected cities. This is a solicitation and order form for your listing in our annual publication and not a bill, invoice or renewal of any previous advertising.

TO INSURE INSERTION OF YOUR CORRECT LISTING
— CORRECT SAMPLE IF NECESSARY —

— CLASSIFICATION —

Directory Advertising Gets Results

Loans

Peoples Incorporated
302 N. Glenwood Ave.
Dalton, Georgia

PHONE 278-8011

BUSINESS LISTINGS COST PER YEAR _____ $52.00

MAKE CHECKS PAYABLE TO:
CLASSIFIED DIRECTORY CO.
P. O. BOX 146
LA MESA, CALIF. 92041

DETACH THIS UPPER PORTION AND RETURN WITH YOUR REMITTANCE

Directory Advertising Gets Results

CLASSIFIED DIRECTORY CO. will publish a classified directory encompassing selected businesses throughout selected cities in the United States. There are numerous separate telephone and independent directories now being used in each city and state, but most of these directories are limited as to geographic area covered. Instead of paying various rates to appear in many separate directories, we offer you the opportunity to subscribe to CLASSIFIED DIRECTORY COMPANY'S annual publication. The company's annual publication will go to print on or before December 30, 1966. Each paid subscriber will receive one free copy of the directory. Additional copies may be purchased for three dollars each. There will be additional directories printed and these additional directories may be sold or given away at our discretion.

We have available directories of businesses for nearly all of the United States, and we can make the name, address, and telephone number available to our subscribers at a nominal cost. You can request names and addresses of hotels and motels in a city where you're planning a trip — names of stores in a city where you wish to purchase a local product — or of businesses in a city where there might be good sales prospects for your product or service. Send remittance for your listing within ten days of receipt of this solicitation and you may make five requests of DIRECTORY INFORMATION SERVICE free annually. All other requests for directory information are charged at five dollars each. There will be no changes or refunds 30 days after we receive the order form at top of this letter. Correct sample listing or make changes now if necessary.

CLASSIFIED DIRECTORY CO.
P. O. Box 146, La Mesa, Calif. 92041

BEST AVAILABLE COPY

* Similar to Government Exhibit 21c

EXHIBIT NO. 2*

CLASSIFIED DIRECTORY

OF BUSINESS AND PROFESSIONAL LISTINGS ENCOMPASSING BUSINESS FIRMS IN MOST LEADING CITIES. THIS IS A SOLICITATION FORM AND NOT A BILL, INVOICE OR RENEWAL.

PROPOSED LISTING BELOW TO APPEAR IN OUR CLASSIFIED AND ALPHABETICAL SECTION

TO INSURE INSERTION OF YOUR CORRECT LISTING RETURN THIS SOLICITATION WITH CHECK

CLASSIFICATION —

LUBRICATING SYSTEMS

GERHARDT'S INC
819 Central Ave
New Orleans, Louisiana 833-7254

BUSINESS LISTING COST PER YEAR..... $52.00

MAKE CHECKS PAYABLE TO:

CLASSIFIED DIRECTORY CO.
P. O. Box 146, La Mesa, Calif. 92041

— CORRECT LISTING IF NECESSARY —

SEE REVERSE SIDE FOR PURPOSE OF DIRECTORY

PURPOSE AND AGREEMENT

CLASSIFIED DIRECTORY COMPANY WILL PUBLISH AN INDEPENDENT BUSINESS DIRECTORY ENCOMPASSING PROFESSIONAL AND BUSINESS FIRMS THROUGHOUT MAJOR SELECTED CITIES. UNLIKE NUMEROUS LOCAL DIRECTORIES WHICH ARE LIMITED IN AREA DISTRIBUTION THIS DIRECTORY WILL BE EXTENSIVE IN DISTRIBUTION WITH CIRCULATION FREE TO ALL PAID SUBSCRIBERS. THERE WILL BE ADDITIONAL DIRECTORIES PRINTED AND THESE DIRECTORIES MAY BE PURCHASED FOR A CHARGE OF TWO DOLLARS PER COPY OR DISTRIBUTED FREE TO CIVIC OR OTHER INSTITUTIONS AT THE DISCRETION OF THE PUBLISHERS. WE OFFER YOU THIS OPPORTUNITY TO SUBSCRIBE TO OUR ANNUAL BUSINESS CLASSIFIED DIRECTORY AT A YEARLY RATE AS SHOWN ON THE REVERSE SIDE OF THIS SOLICITATION FORM. ADVERTISERS LISTINGS WILL APPEAR IN OUR DIRECTORY AS SHOWN ON THE REVERSE SIDE OF THIS FORM, UNLESS CORRECTIONS ARE MADE AND BROUGHT TO THE ATTENTION OF THE PUBLISHERS. WE ARE NOT LIABLE FOR UNINTENTIONAL ERRORS OR OMISSIONS. IN CASE OF ERROR, THE EXTENT OF OUR LIABILITY SHALL BE AN ABATEMENT OF THE ENTIRE CHARGE. ADVANCE PAYMENT IS REQUIRED AND RECEIPT OF YOUR CHECKS IS AN ACCEPTANCE OF OUR OFFER TO PUBLISH YOUR BUSINESS LISTING, NOW APPEARING IN ANOTHER PUBLICATION IN OUR DIRECTORY.

THIS IS AN INDEPENDENT PUBLICATION AND HAS NO ASSOCIATION WITH ANY OTHER DIRECTORY PUBLISHERS.

OUR DIRECTORY WILL BE PUBLISHED ON OR BEFORE DEC 30, 1966. YOUR CANCELLED CHECK WILL BE YOUR RECEIPT FOR PAYMENT.

GERHARDT'S INC MAY [illegible]

* Similar to Government Exhibit 15

EXHIBIT NO. 3*

CLASSIFIED DIRECTORY

OF BUSINESS AND PROFESSIONAL LISTINGS THROUGHOUT METROPOLITAN AND URBAN AREAS OF THE COUNTRY.—THIS IS A SOLICITATION FORM. NOT A BILL, INVOICE OR RENEWAL.

BELOW PROPOSED SAMPLE LISTING TO APPEAR IN OUR CLASSIFIED AND ALPHABETICAL SECTION

CLASSIFICATION—

ELECTRIC CONTRACTORS

To Ensure Correct Insertion
RETURN ENTIRE FORM WITH CHECK

Eastern Electric Co. Inc.
1023 Hunter
Baltimore, Maryland

BUSINESS LISTINGS
COST PER YEAR.....$65.00

Make checks payable to:

Telephone No.: MU 5-6197
—CORRECT YOUR LISTING IF NECESSARY—
SEE REVERSE SIDE FOR PURPOSES OF DIRECTORY

CLASSIFIED DIRECTORY COMPANY
POST OFFICE BOX 176
CAMPO, CALIFORNIA 92006

CLASSIFIED BUSINESS DIRECTORY

CLASSIFIED DIRECTORY CO. will publish a classified directory encompassing businesses throughout selected cities in the United States. There are numerous separate telephone and independent directories now being used in each city and state, but most of these directories are limited as to geographic area covered. Instead of paying various rates to appear in many separate directories, we offer you the opportunity to subscribe to *CLASSIFIED DIRECTORY COMPANY'S* annual publication. The company's annual independent publication will go to print on or before December 30, 1966. Each paid subscriber will receive one free copy of the directory. Additional copies may be purchased for three dollars each, or given away at our discretion. Custom mailing lists compiled to your order on gummed labels for any type businesses, manufacturers or professionals nationwide or any city. Price per thousand on request.

We have available directories of businesses for nearly all of the United States, and we can make the name, address, and telephone number available to our subscribers at a nominal cost. You can request names and addresses of hotels and motels in a city where you're planning a trip---names of stores in a city where you wish to purchase a local product---or of businesses in a city where there might be good sales prospects for your product or service. Send remittance for your listing within ten days of receipt of this solicitation and you may make five requests of *DIRECTORY INFORMATION SERVICE* free annually. All other requests for directory information are charged at five dollars each.

* Similar to Government Exhibit 27a

EXHIBIT NO. 4*

CLASSIFIED DIRECTORY

OF BUSINESS AND PROFESSIONAL LISTINGS THROUGHOUT METROPOLITAN AND URBAN AREAS OF THE COUNTRY.— THIS IS A SOLICITATION FORM. NOT A BILL, INVOICE OR RENEWAL.

BELOW PROPOSED SAMPLE LISTING TO APPEAR IN OUR CLASSIFIED AND ALPHABETICAL SECTION

CLASSIFICATION—
SAFE-MOVERS

CHRETIEN STORAGE
WAREHOUSE INC.
300 Elm
Buffalo N. Y.

Telephone No.: 852-2800
— CORRECT YOUR LISTING IF NECESSARY —
SEE REVERSE SIDE FOR PURPOSE OF DIRECTORY

To Ensure Correct Insertion
RETURN ENTIRE FORM WITH CHECK

BUSINESS LISTINGS
COST PER YEAR $65.00

MAKE CHECKS PAYABLE TO:

CLASSIFIED DIRECTORY COMPANY
P. O. Box 176, Campo, Calif. 92006

CLASSIFIED BUSINESS DIRECTORY

CLASSIFIED DIRECTORY CO. will publish a classified directory encompassing businesses throughout selected cities in the United States. There are numerous separate telephone and independent directories now being used in each city and state, but most of these directories are limited as to geographic area covered. Instead of paying various rates to appear in many separate directories, we offer you the opportunity to subscribe to CLASSIFIED DIRECTORY COMPANY'S annual publication. The company's annual independent publication will close Dec. 30, 1967. Distribution about April 1. Each paid subscriber will receive one free copy of the directory. Additional copies may be purchased for three dollars each, or given away at our discretion. Custom mailing lists compiled to your order on gummed labels for any type businesses, manufacturers or professionals nationwide or any city. Price per thousand on request.

We have available directories of businesses for nearly all of the United States, and we can make the name, address, and telephone number available to our subscribers at a nominal cost. You can request names and addresses of hotels and motels in a city where you're planning a trip—names of stores in a city where you wish to purchase a local product—or of businesses in a city where there might be good sales prospects for your product or service. Send remittance for your listing within ten days of receipt of this solicitation and you may make five requests of DIRECTORY INFORMATION SERVICE free annually. All other requests for directory information are charged at five dollars each.

* Similar to Government Exhibit 11b

EXHIBIT NO. 5*

RENEWAL INVOICE

CLASSIFIED BUSINESS DIRECTORY

	Annual Cost
CLASSIFICATION — STEEL ERECTORS	65.00
TOTAL COST	$65.00

G & A CONTRACTORS, INC.
2550 Fairburn Rd. SW
Atlanta, Ga. 30331

344-2152

MAKE CHECKS PAYABLE TO:
CLASSIFIED DIRECTORY COMPANY
P. O. Box 176
Campo, Calif. 92006

DETACH THIS UPPER PORTION AND RETURN WITH YOUR REMITTANCE

The above listing appeared in our 1967 CLASSIFIED DIRECTORY CO. annual publication.

Upon payment of this renewal invoice the above listing will appear in our 1968 annual classified directory, to be published on or before April 1, 1968.

ANNUAL RENEWAL COST	$65.00

CLASSIFIED DIRECTORY COMPANY
P. O. Box 176, Campo, Calif. 92006

* Similar to Government Exhibits 3, 14, 29a, 34, 36a, 37c

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No. 71-309

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN D. BURTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-309

JOHN D. BURTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on twenty-seven counts of mail fraud, in violation of 18 U.S.C. 1341. On September 11, 1970, he was sentenced to concurrent two-year prison terms on each count. On May 28, 1971, the court of appeals affirmed in a *per curiam* opinion (Pet. App. B 6-8). The petition for a writ of certiorari was not filed until August 30, 1971, and is substantially out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no cause for further review.

The evidence shows that in January 1965 postal authorities in Florida had occasion to interview petitioner concerning solicitations he was then making to

advertisers in local classified telephone directories. Petitioner had no connection with the publishers of such directories but presumably intended to publish a classified directory himself. A postal inspector told him that the solicitations could be fraudulent as they were addressed to telephone directory advertisers and their format was such that the addressee might conclude he was being billed for a renewal of the advertisement in his local classified telephone directory. Petitioner thereupon agreed to discontinue his Florida based venture (T. 460, 465–466, 472).[1]

Petitioner subsequently moved to California where he formed the Classified Directory Company. Commencing in December 1965 and continuing until early 1967, he sent a large volume of form mailings to various business entities throughout the United States (T. 240, 249, 267, 613, 640). The forms were sent only to advertisers in local classified telephone directories, and were copies of the advertiser's name, address, telephone number and industrial classification, as shown in the local directory (T. 227–229, 237–238, 280, 442). Typically these forms showed, in bill form, the cost per year for a directory listing and requested that the entire form be returned with a check for the noted cost in order "to ensure correct insertion." The upper part of the front portion of the form recited, in smaller print, that it was "a solicitation form, not a bill, invoice or renewal." The form also explained that a classified directory would be published

[1] "T." refers to the six-volume trial transcript which we are lodging with the Clerk of this Court. The first five volumes are consecutively paginated.

on or before December 30, 1966, "encompassing selected businesses throughout selected cities in the United States" (see, *e.g.*, Pet. App. D. 12).

After receipt of these forms, a number of advertisers in the yellow pages of local classified telephone directories in Maryland interpreted petitioner's solicitation form as a bill for the advertisements they had placed in the local directories (*e.g.*, T. 45, 62–63, 93, 103). Acting on this erroneous belief, they paid petitioner's company the amount noted as the "annual cost" on the form which petitioner had mailed, either $52 or $65 (*e.g.*, T. 93, 138, 169, 275, 511). By doing so, none intended to buy a listing in the directory which petitioner later published and which they regarded as being of no value to them (*e.g.*, T. 53, 97, 174, 279, 284, 291).[2]

1. Petitioner's basic contention is that there was insufficient evidence to support his conviction; he urges that the forms he mailed out were not misleading and that his alleged "victims" were negligent and failed to act as prudent persons.

As for the form letters, petitioner argues that since they stated that they were solicitations, this shows that they were not designed to be fraudulent bills (Pet. 19, 22–23, 32–37). The jury, however, was not bound by the literal language which petitioner employed. Even though no affirmative misrepresentation of fact is made, a fraud may be intended. See *Blachly* v. *United States*, 380 F. 2d 665, 673 (C.A. 5). In the

[2] Petitioner is mistaken in asserting that none made complaint prior to being contacted by postal authorities (Pet. 36–37). The trial evidence is to the contrary (*e.g.*, T. 513–514, 545–547).

present case there was ample evidence of fraud, including petitioner's prior experience with postal authorities which indicated knowledge by him of a likelihood of misunderstanding by recipients. See *United States* v. *Press*, 336 F. 2d 1003, 1011 (C.A. 2), certiorari denied, 379 U.S. 965. Moreover, petitioner's use of the name Classified Directory Company, the copying of the classification heading, name, address and telephone number of the recipients exactly as they appeared in the local classified telephone directories, his use of a format which resembled a bill, and the mailing of the forms to persons who might have cause to believe that they owed a debt to a local telephone directory publisher were all circumstances from which the jury could conclude that the forms were designed to be interpreted by unwary recipients as bills for previously purchased listings (or renewals of listings) in the yellow pages of the local telephone directories. See *United States* v. *Leopold*, 418 F. 2d 247, 248 (C.A. 4).[3]

[3] *United States* v. *Kram*, 247 F. 2d 830 (C.A. 3), upon which petitioner relies, is readily distinguishable. There the defendant included the word "religious" in the title of his company but when he solicited the purchase of a religious article which he had mailed to a recipient he wrote that the article was sent by "an enterprise that is owned and operated for the benefit of Murray Kram." Kram was indicted for *misleading* recipients into thinking his solicitations were from a religious organization. In reversing his conviction, the court of appeals concluded that there was "hardly a scintilla" of evidence to support the charge that material mailed was misleading (247 F. 2d at 832–833). The decision in *Kram*, thus turned on the failure of the government's evidence to sustain its charge in a particular factual context. It does not govern here where the factual context is entirely different.

The related contention that those who responded to petitioner's mailings as bills were negligent and did not exercise due diligence is also without merit. The trial court properly instructed in this case that the issue was whether petitioner's efforts were designed to deceive persons of ordinary prudence and comprehension (T. 774). This was a correct instruction. See *Blachly* v. *United States, supra,* 380 F. 2d 665, 671–674 (C.A. 5); *Irwin* v. *United States,* 338 F. 2d 770, 773 (C.A. 9), certiorari denied, 381 U.S. 911. That there were those taken in who may have felt chagrin and tended to blame their own lack of prudence hardly precluded the jury from finding a fraudulent intent.

2. Finally, petitioner appears to argue that because the postal investigation commenced in California but he was indicted in the District of Maryland the proceedings were unfair (Pet. 12, 20–22). Petitioner, however, was tried in the District of Maryland only for offenses which had occurred in the district. Venue in that district was proper since it was the district to which petitioner's letters moved and from which he received the mailed remittances. 18 U.S.C. 1341; see *Reed Enterprises* v. *Clark,* 278 F. Supp. 372, 376–377 (D. D.C.), affirmed, 390 U.S. 457.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971